

STATE OF MICHIGAN  
COURT OF APPEALS

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TOMMY JONES and JOANN JONES,

Plaintiffs-Appellees,

v

JAMES TIMOTHY ELMORE, DAVID LA  
DOUCEUR and JAMES BROTHER'S  
LANDSCAPE & POND SUPPLY, INC.,

Defendants/Third-Party Plaintiffs-  
Appellees.

v

POWER PLAY CUSTOM TRAILERS and  
STEPHEN SASSEK,

Third-Party Defendants-Appellants.

UNPUBLISHED

October 19, 2006

No. 260879

Wayne Circuit Court

LC No. 03-335438-NI

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Before: Davis, P.J., and Murphy and Schuette, JJ.

DAVIS, P.J. (*dissenting*).

I respectfully dissent. I believe the majority admirably desires to avert a harsh result in this matter, but I simply do not believe that our court rules permit the result they reach.

As the majority notes, a default or a default judgment may only be set aside “if good cause is shown and an affidavit of facts showing a meritorious defense is filed.” MCR 2.603(D)(1). “Good cause” requires either “a procedural irregularity or defect in the proceeding upon which the default is based” or “a reasonable excuse for failure to comply with the requirements that created the default.” *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). The strength of the meritorious defense will influence how much of a showing of “good cause” must be shown. *Id.*, 233-234. Third-party defendants rely in part on deposition transcripts that were not part of the lower court record. Our “review is limited to the record established by the trial court,” *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), so consideration of those depositions would be improper. Nevertheless, I agree with the majority that third-party defendants’ affidavit of meritorious defense is sufficient.

However, this is not enough to obviate the requirement of showing good cause. *Alken-Ziegler, supra* at 233-234. Third-party defendants assert a “substantial irregularity or defect” on the grounds that the third-party complaint fails to comply with MCR 2.111(B)(2) and the original complaint was not attached to the third-party complaint. MCR 2.111(B)(2) requires third-party complaints to contain:

A demand for judgment for the relief that the pleader seeks. If the pleader seeks an award of money, a specific amount must be stated if the claim is for a sum certain or a sum that can by computation be made certain, or if the amount sought is \$25,000 or less. Otherwise, a specific amount may not be stated, and the pleading must include allegations that show that the claim is within the jurisdiction of the court.

The third-party complaint demands judgment against third-party defendants for “all costs, interest and attorney fees so wrongfully incurred,” reasonably clearly referring to third-party defendants’ asserted liability “to Third-Party Plaintiffs for all or part of the claims presented by Plaintiffs.” It is undisputed that, until a judgment was actually rendered against third-party plaintiffs in the original suit, no sum could be stated with certainty. Otherwise, MCR 2.111(B)(2) does not require an explicit statement in so many words that the claim is within the jurisdiction of the circuit court. Rather, it requires only that jurisdiction is evident from the allegations. The third-party complaint unambiguously demonstrates that it is derivative of a claim already pending in the circuit court, and therefore within the circuit court’s jurisdiction. Although the better practice might have been to provide an explicit statement to that effect, we do not perceive an “irregularity or defect,” let alone a “substantial” one.

The majority in a footnote points out that the third-party complaint fails to make clear the possibility that up to \$3,500,000 could be at stake. There is a logical reason MCR 2.111(B)(2) does not require such an indication in a circumstance like this. The third-party complaint essentially sought indemnification for whatever amount third-party plaintiff ultimately became liable to pay. I see nothing in the record presented to the trial court suggesting that any parties knew at the time the third-party complaint was filed how much that would be. I do not see how, under the circumstances, failure to state a dollar amount renders the third-party complaint “blatantly defective and deficient relative to the necessary jurisdictional allegations,” particularly if the majority concedes that “the showing [of good cause] is not particularly strong.” Further, I would suspect that at the time third-party plaintiffs drafted, filed, and served the third party complaint, they were engaged in an active defense against first-party plaintiff in an attempt to minimize potential damages for themselves, especially as they would have had no clear idea of what counterclaims and defenses, if any, were available to third-party defendants. The third-party complaint was not “for a sum certain or a sum that can by computation be made certain,” and therefore did not require a specific amount to be stated.

Third-party defendants otherwise assert the “reasonable excuse” that Sassek was confused. Third-party defendants admit that Sassek failed to provide a written response simply because he was unaware that he should, and he failed to take appropriate steps to find an attorney. Third-party defendants also rely heavily on events after the time to file an answer had expired. These events are irrelevant because they could not have any bearing on third-party defendants’ “failure to comply with *the requirements that created the default*,” *Alken-Ziegler, supra* at 233, which here is the failure to file an answer to the third-party complaint. Although

this result may seem harsh, it has long been “a maxim of the law that ‘ignorance excuses no one.’” *Curley v Beryllium Development Corp*, 281 Mich 554, 556; 275 NW 246 (1937). A party’s “failure to retain counsel or to otherwise protect his own interests over a substantial period of time during which he was aware of [a] suit is inexcusable.” *Dollar Rent-A-Car Systems v Nodel Constr Co, Inc*, 172 Mich App 738, 741; 432 NW2d 423 (1988). Additionally, as the majority points out, third-party defendants had some prior involvement in the matter and even gave a deposition prior to filing the third-party complaint, so they could not have been completely unaware of at least the general nature of the case.

Third-party defendants failed to show a substantial irregularity or defect in the proceeding that resulted in their default, and they also failed to assert any reasonable excuse for failing to comply with the requirements that resulted in their default. Accordingly, I believe the trial court properly complied with the dictates of the court rule in refusing to set aside the default.

/s/ Alton T. Davis